

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-000070
Common Pleas Case No. 2014-CP-23-04432

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FEB 11 2019

SC Court of Appeals

John C. Monarch,
Direct Outbound Services, LLC;
ShipChain, Inc.; Aaron Kelly;
Sami Rusani; and Brian Evans,

Respondents,

v.

Richard A. Gorman,

Appellant.

RESPONDENT BRIAN EVANS' REPLY IN SUPPORT OF HIS MOTION TO DISMISS

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COMES NOW, Respondent Brian Evans (“Evans” or “Respondent”) and submits this Reply in Support of His Motion to Dismiss pursuant to Rule 240, SCACR, requesting that this Court dismiss Appellant Richard Gorman’s (“Appellant” or “Gorman”) appeal of this matter as untimely. In support, Respondent Evans shows this Honorable Court the following:

I. INTRODUCTION

In Appellant’s Return to Respondent Brian Evans’ Motion to Dismiss (the “Return”), Appellant petitions this Honorable Court to rewrite the South Carolina Rules of Civil Procedure simply because he failed to follow them. Simply put, Appellant’s appeal of this matter is procedurally barred as to Respondent Evans because Appellant failed to meet the deadline of December 6, 2018, to *serve* Respondent Evans with the with his Motion to Reconsider Dismissal of Defendants Kelly, Rusani, and Evans (the “Motion to Reconsider”) as required by Rule 59(e), SCRCF. In doing so, Appellant also failed to meet the December 27, 2018, deadline to file a notice of appeal as required by Rule 203(b), SCACR. Accordingly this appeal as to Respondent Evans should be dismissed.

It is undisputed between Appellant and Respondent Evans that the Notice of Electronic Filing (“NEF”) for Appellant’s Motion Reconsider was not transmitted to Respondent Evans or his counsel of record. It is further undisputed that Appellant never served his Motion to Reconsider upon Respondent Brian Evans or his counsel of record by court service, mail, email, or any other method permitted under Rule 5, SCRCF, at all.

Yet, curiously, Appellant contends that the mere e-filing of his Motion to Reconsider is sufficient to effectuate service upon Respondent Evans. Appellant is wrong. Appellant’s attorney had notice via the NEF that Respondent Evans was not served with the Motion to Reconsider within fifty (50) seconds of filing and should have attempted other methods to serve Respondent

Evans. Indeed, under Section 4(d) of the South Carolina Electronic Filing Policies and Guidelines ("SCEF"), Appellant could have timely served Respondent Evan by virtually any method. And, despite the fact that the ten-day deadline to serve a motion to reconsider set forth by Rule 59(e), SCRCF, is absolute and cannot be missed without consequence, Appellant failed to do so.

Appellant blames everyone but himself for his own failure to properly serve his Motion to Reconsider. Indeed, Appellant attempts to place the burden to prove service of Appellant's Motion to Reconsider on either the Clerk of the Court of Commons Pleas, or even worse, upon Respondent Evans. As Appellant would have it, Respondent Evans should have a duty to continue to surveil the docket at all hours of the day and night in the event another party files a document relating to him. Appellant's position would lead to an unconscionable result: that Respondent Evans, after being dismissed from the case, should be required to continue to monitor the docket in perpetuity. No South Carolina court has ever entertained the idea of fashioning a duty to monitor a court docket. As such, this Court should not entertain Appellant's whimsical argument to shift the burden from the movant to the Clerk of Court, or the non-movant Respondents who had been dismissed from the case.

The service requirements of Rules 5 and 59, SCRCF, as well as Section 4, SCEF, are clear. It is Appellant's own failure to follow the South Carolina Rules of Civil Procedure and South Carolina Electronic Filing Guidelines and Procedures that caused Appellant to miss the service deadline of Rule 59(e), SCRCF, and, by extension, the deadline to file a notice of appeal under Rule 203, SCACR. Consequently, Appellant's appeal of this matter is untimely and should be dismissed.

II. ARGUMENT AND CITATAION OF AUTHORITY

a. Undisputed Facts and Tenets of Law.

In this case, the following applicable facts and tenets of law are undisputed between Appellant and Respondent Evans:

- On November 26, 2018, the trial court entered an order dismissing Respondent Evans from the case without prejudice for want of personal jurisdiction. (See the "Order," Ex. F to Respondent's Motion to Dismiss).
- Pursuant to Rule 59(e), SCRPC, "[a] motion to alter or amend the judgment shall be *served* not later than 10 days after receipt of written notice of the entry of the order."
- The ten-day deadline in Rule 59(c), SCRPC, is an absolute deadline. The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018).
- The ten-day deadline for Appellant to serve his Motion to Reconsider upon Respondent Evans expired on December 6, 2018. (See Notice of Electronic Filing ("NEF"), Ex. H to Respondent's Motion to Dismiss); *see also* Rule 59(e), SCRPC.
- On December 6, 2018, Appellant Gorman filed his Motion to Reconsider. (See Motion to Reconsider, Ex. G to Respondent's Motion to Dismiss).
- The NEF for Appellant's Motion Reconsider was not transmitted to Respondent Evans or his counsel of record. (See NEF, Ex. H, to Respondent's Motion to Dismiss; *see also* Appellant's Return p. 3).
- Appellant has never served his Motion to Reconsider upon George G. Robertson, Respondent Brian Evans, or any attorney at Holland & Knight LLP by court service, mail,

email, or any other method permitted under Rule 5, SCRCP. (See NEF, Ex. H to Respondent's Motion to Dismiss; Affidavit of George G. Robertson, Ex. M to Respondent's Motion to Dismiss; *see also* Appellant's Return p. 3).

- The NEF for Appellant's Motion to Reconsider was transmitted to counsel for Appellant. (See NEF, Ex. H to Respondent's Motion to Dismiss).

Since it is undisputed that Respondent Evans was never served with Appellant's Motion to Reconsider by NEF, mail, email, or any other method permitted under Rule 5, SCRCP, Appellant's mere e-filing of the Motion to Reconsider was insufficient to effectuate service upon Respondent Evans pursuant to Rule 5, SCRCP.

b. Appellant Failed to Properly Serve Respondent Evans as Required by Rule 5, SCRCP, and Section 4 of the South Carolina Electronic Filing Policies and Guidelines.

Pursuant to Rule 5, SCRCP, all written motions shall be served upon each of the parties of record. In most trial courts in South Carolina, service of a document is typically effected upon counsel of record by e-filing pursuant to the South Carolina Electronic Filing Policies and Guidelines ("SCEF").¹ Sections 4(c)(2) and (3), SCEF, provide as follows:

(2) Automatic Service of Other Papers on Authorized E-Filers by the E-Filing System. Except as provided in sub-paragraphs (A) and (B) below, upon the E-Filing of any pleading, motion, or other paper subsequent to the summons and complaint or other filing initiating a case, the E-Filing System will automatically generate and transmit a["Notice of Electronic Filing" ("NEF")] to all Authorized E-Filers associated with that case. Where the parties are proceeding in the E-Filing System and a pleading, motion, or other paper must be filed, made, or served under the SCRCP, the E-Filing of that pleading, motion, or other paper, together with the transmission of an NEF, constitutes proper service under Rule 5, SCRCP, as

¹ The South Carolina Electronic Filing Policies and Guidelines were created by Order of the Supreme Court of South Carolina on October 28, 2015, and were adopted by Greenville County, South Carolina, on March 22, 2016. *See In re: South Carolina Filing Policies and Guidelines; Pilot Version—Common Pleas*, S.C. Sup. Ct. Order dated October 28, 2015 (Shearouse Adv. Sh. No. 42); *In re: Expansion of Electronic Filing Pilot Program—Court of Common Pleas*, S.C. Sup. Ct. Order dated March 10, 2016 (Shearouse Adv. Sh. No. 11).

to all other parties who are E-Filers in that case. It is the responsibility of an E-Filer to review the content of the E-Filed document in the E-Filing System to determine its force and effect.

(3) Service Complete Upon E-Filing. Service of a pleading, motion, or other paper by NEF subsequent to the summons and complaint or other filing initiating a case is complete at the time of the submission of the pleading, motion, or other paper for E-Filing, provided an NEF is transmitted by the E-Filing System in accordance with paragraph (e)(2) of this Section. The act of E-Filing the pleading, motion or other paper is the equivalent of depositing it in the United States Mail under Rule 5(b)(1), SCRCP. The NEF constitutes proof of service under Rule 5(b), SCRCP, and the date of service shall be the date stated in the NEF as the "Official File Stamp." Where notice of the filing of a pleading, motion, or other paper is served by an NEF, the E-Filer need not file proof of service, but the E-Filer must retain a copy of the NEF as proof of service.

Id. (Emphasis added). In short, to effect proper service of a motion via e-filing pursuant to Rule 5, SCRCP, the following must occur: (1) the filing party must file the motion with the court using the E-Filing System, *and* (2) an NEF must be transmitted by the E-Filing System to all authorized E-Filers.

Here, Appellant filed the Motion to Reconsider utilizing the E-Filing System. (See Motion to Reconsider, Ex. G to Respondent's Motion to Dismiss). Nevertheless, *it is undisputed that the NEF for Appellant's Motion Reconsider was not transmitted to Respondent Evans or his counsel of record.* (See NEF, Ex. H, to Respondent's Motion to Dismiss; see also Appellant's Return p. 3). Mere filing of a motion is not enough to constitute proper service under Rule 5, SCRCP. To be sure, Section 4, SCEF, makes it clear that an NEF must also be transmitted to the recipient. Accordingly, Respondent Evans has not been properly served with Appellant's Motion to Reconsider under Rule 5, SCRCP, and Section 4, SCEF, because the NEF was never transmitted to Respondent Evans or his counsel of record.

Section 4(e)(6), SCEF, addresses instances in which there is a failure to transmit an NEF as follows:

Failed Transmission of NEF. If an Authorized E-Filer becomes aware that the NEF was not transmitted successfully to other Authorized E-Filers in the case, or that the NEF is deficient, the Authorized E-Filer shall, upon learning of the failure or deficiency, serve the E-Filed document by email, hand delivery, facsimile, or first class mail. Proof of such service shall be E-Filed within one business day of service.

In an obvious attempt to anticipate an argument relating to this rule, Appellant's counsel makes the unsubstantiated *ad hoc* statement that he "was not aware that the clerk of court failed to send an NEF to Respondent Evans' counsel" until after he received the January 15, 2019 letter. (*See* Appellant's Return, p. 3).² Appellant filed his Motion to Reconsider on December 6, 2018, at 5:21 PM. (*See* Motion to Reconsider, Ex. G to Respondent's Motion to Dismiss). According to counsel's own filings with the court, in *at most* the next fifty (50) seconds, the E-Filing System transmitted the NEF for Appellant's Motion to Reconsider to counsel for Appellant at 5:21:50 PM. (*See* NEF, Ex. H to Respondent's Motion to Dismiss). At that time, counsel for Appellant had notice³ of which parties in the case had been served with the Motion to Reconsider, because the names of those served are listed on the NEF. (*See id.*). The NEF is noticeably bereft of Respondent Evans or his counsel. (*See id.*). Counsel for Appellant's self-serving and unsupported statement that he was unaware that Respondent Evans had not received the NEF proves too much: it simply means that Appellant's counsel apparently failed to read the NEF for his own court filing. It also belies the evidence of record in this Court—the NEF itself—which clearly shows that counsel for

² Notably, Appellant presents this point in his Return without citation to an affidavit of Appellant's Counsel or any other evidence of record. Thus, this bare assertion should be disregarded by this Court because Appellant fails to base the statement upon any factual evidence of record. *See* Rule 240(c)(3), SCACR, ("Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.").

³ Counsel for Appellant had actual notice or, at the very least, constructive notice that Respondent Evans had not been served with the Motion to Reconsider.

Appellant nearly immediately received the NEF, and Counsel for Respondent Evans did not.

Pursuant to Section 4(e)(6), SCEF, Appellant's counsel should have nearly immediately realized that there was an issue with the transmission of the NEF to Respondent Evans' counsel and served the Motion to Reconsider "by email, hand delivery, facsimile, or first class mail." But, even with the ease and speed of email as an option, Appellant's counsel did none of these things. *Indeed, Appellant has still never served his Motion to Reconsider upon Respondent Evans, or his counsel of record by any method. Ever.* (See NEF, Ex. H to Respondent's Motion to Dismiss; Affidavit of George G. Robertson, Ex. M to Respondent's Motion to Dismiss; *see also* Appellant's Return p. 3).

It is undisputed that the ten-day deadline to serve a motion to reconsider set forth by Rule 59(e), SCRCP, is absolute and cannot be missed without consequence. *See* Rule, 59(e), SCRCP; *See Overland, Inc. v. Nance*, 423 S.C. 253, 256-57, 815 S.E.2d 431, 433 (2018). It is, therefore, Appellant's own failure to follow the South Carolina Rules of Civil Procedure and South Carolina Electronic Filing Guidelines and Procedures that has caused Appellant to miss the service deadline of Rule 59(e), SCRCP, and, by extension, the deadline to file a notice of appeal under Rule 203, SCACR. Consequently, Appellant's appeal of this matter is untimely and should be dismissed.

c. Appellant Attempts to Improperly Place the Burden of Service Upon the Clerk of Court and/or the Non-Movant Parties in the Case.

Simply put, Appellant's position is to cast blame upon others for his own failure to properly serve his Motion to Reconsider pursuant to Rules 5 and 59(e), SCRCP. Indeed, in his Return, Appellant laments "[i]t is not Appellant's fault that the clerk of court apparently did not send the NEF to Respondent Evans' counsel." (*See* Appellant's Return, p. 3).⁴ Further, Appellant claims

⁴ Despite this assertion, Appellant offers no evidence that the failure of the NEF transmittal was caused by clerical error.

that “Appellant did all that *he* was required to do to serve the motion to reconsider.” (*See id.*). By making these assertions, Appellant desperately attempts to place the burden to prove service of Appellant’s Motion to Reconsider on either the Clerk of the Court of Commons Pleas, or even worse, upon Respondent Evans. Appellant’s position is not only unsupported by South Carolina law, but would lead to an unconscionable result.

Notably at the time Appellant filed his Motion to Reconsider, Respondent Evans had been dismissed as a party from the case. As Appellant would have it, however, Respondent Evans should have a duty to continue to surveil the docket at all hours of the day and night in the event another party files a document relating to him. This duty to monitor the docket would place an undue onus on the non-filing parties, and would undermine the very purposes of service under the South Carolina Rules of Civil Procedure—to provide sufficient notice to the non-movant parties. *See Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (noting that the purpose of service is to provide notice); *Bass v. Am. Prods. Exp. & Imp. Corp.*, 124 S.C. 346, 351, 117 S.E. 594, 596 (1923) (same). Even more unconscionable is the idea that Respondent Evans, who had been dismissed from the case, should be required to monitor the docket in perpetuity to protect against Appellant’s apparent failure to read his own NEF.

Appellant presents no authority to support his wish for this Court to establish his whimsical continuing “duty to monitor the docket” doctrine. No South Carolina court has ever entertained the idea of fashioning a duty to monitor a court docket. Moreover, the United States Court of Appeals for the Fourth Circuit has twice declined to impose a “general duty to monitor dockets” in similar cases involving electronic dockets. *See Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 410–411 (4th Cir. 2010); *Fernandes v. Craine*, 538 F. App’x 274, 276 (4th Cir. 2013). As such, this Court should not entertain Appellant’s novel argument to shift the burden of service

from the movant to the Clerk of Court, or the non-movant Respondents.

III. CONCLUSION

WHEREFORE, Appellant Richard Gorman's appeal of this matter should be dismissed because he failed to file his Notice of Appeal within the 30-day time period required by Rule 203, SCACR. Respondent Evans respectfully requests the following that this Honorable Court dismiss Appellant Richard Gorman's Appeal, award costs of appeal and attorney's fees pursuant to Rule 222, SCACR, order sanctions pursuant to Rule 269, SCACR, and S.C. Code Ann. § 15-36-10, and for such further relief as this Court necessary or appropriate.

Dated: February 6, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Dismiss in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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